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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-905

ARNOLD A. MORSE, SR.,
and
HELLEN V. MORSE,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONERS' REPLY BRIEF

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The United States in its opposing brief in No. 905 relies on three cases - *Standard Oil v. Johnson*, 316 U.S. 481 (1942); *Donaldson v. Commissioner*, 51 T.C. 830 (1969); and *Raffensperger v. Commissioner*, 33 T.C. 1097 (1960), each of which requires specific comment in response.

REBUTTAL

First, the *Standard Oil* case, a decision of this Court, is factually distinguishable and on careful reading supports petitioners' contention for exemption on the basis of lack of control and supervision by the Government over the activities of petitioners' employer. In the *Standard Oil* case, the late Justice Black, in speaking for the Court, clearly delineated the specific control and supervision actually exercised by the commanding officer of the Army post over the daily affairs and activities of the post exchange. It is this specific lack of control and supervision by the Government which petitioners urge is significantly lacking and distinguishes their case from *Standard Oil*.

Unfortunately, omissions from the *Standard Oil* case quoted in part in the decision by the Court of Claims (Pet. App. A-5, A-6) are particularly misleading as concerns the extent of the control and supervision exercised by the commanding officer. In order to clarify any possible misconception and to get a clearer understanding of petitioners' argument, two entire paragraphs of the *Standard Oil Co. v. Johnson*, 316 U.S. 481, decision at Pages 484-485 are quoted:

> "The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. *He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary.* The object of the exchanges

is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. *Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The Government assumes none of the financial obligations of the exchange. But* government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.

From all of this, we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. In concluding otherwise, the Supreme Court of California was in error." (Emphasis added)

Comparing the typical Army post exchange of pre-Pearl Harbor days of 1940 - 1941 with the supermarket operations of petitioners' employer some twenty-five years later, a business with projected annual sales of more than five and one-quarter million dollars, is fallacious. The one cannot be equated with the other nor can the decision of this Court in *Standard Oil* be properly extended to include petitioners' factual situation.

Second, the *Donaldson* case, a decision of the Tax Court wherein the claimant prosecuted his case *pro se*, factually represents material differences in control and supervision. Presumably, because of the modest sum of the refund sought, claimant in that case concluded that a full review on appeal to the United States Court of Appeals with professional counsel was financially impractical. That decision, not having been fully prosecuted, cannot fairly be cited as prevailing precedent in an area of law as important as is this regarding the definition of a "government agency."

Third, the *Raffensperger* case, also a decision of the Tax Court wherein the amount of the refund sought was modest compared to the cost of litigation thereby limiting further expenditure of legal fees and costs on appeal, again deals with a factual situation vastly dissimilar from that in the instant petition. This decision, having limited application, is inappropriate as precedent for the definition of a "government agency."

ARGUMENT

Respondent's contention rests exclusively on the determination made by the court below as to the definition of an "agency of the United States", a decision petitioners submit is predicated on faulty premises of fact resulting in erroneous conclusions of law.

This definition of an "agency of the United States," if allowed to stand, is so general as to include practically any extension of a loosely-knit and semi-official function, a decision the Government may come to regret. With the current broad influence and extensive dependence on Government in wide areas of social, economic, commercial,

cultural and political contacts with the public, including numerous forms of direct aid; grants; exclusive contracts where Government-owned facilities, property, equipment, technical assistance and inspection capabilities are made available to private entrepreneurs; financial assistance; various forms of insurance and subsidies of all kinds; all more or less subject to general guidelines in published regulations and federal statutes, require a more precise definition of an "agency of the United States" than has been judicially made to date.

Contrary to the contentions of the respondent (Brief in Opp. Page 5), the decision of the court below compounds the disarray and lack of uniformity of application of a Federal tax statute and discriminates unfairly against a substantial segment of the tax-paying public. As a result, uncertainty and confusion exist among large numbers of comparably-situated taxpayers, the vast majority of whom are unable to pursue their causes effectively against the power and unlimited resources of Internal Revenue Service and the Federal Government.

CONCLUSION

For the foregoing reasons as well as those which have been urged in the petition, certiorari should be granted.

Respectfully submitted,

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